United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

2-14-77

76-7510/62

To be argued by:
M. E. DEORCHIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

BP/s

ELGIE & COMPANY,
Plaintiff-Appellant,
(Docket No. 76-7510)

—against—

S.S. "S.A. NEDERBURG", her engines, boilers, etc., and SOUTH AFRICAN MARINE CORPORATION, LTD.,
Defendant-Appellee and Third-Party Plaintiff-Appellant,
(Docket No. 76-7562)

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE-APPELLANT

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Jurisdiction

The decision of the United States District Court for the Southern District of New York was filed on September 9, 1976. (*3a) Final judgment was entered on October 13, 1976. Appellant, Elgie, filed a notice of appeal on October 12, 1976. Appellee-appellant South African Marine filed a notice of appeal on November 8, 1976. The record on appeal was transmitted to the United States Court of

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*Reference to pages in Joint Appendix.

Appeals for the Second Circuit on November 1, 1976. Jurisdiction of this Court rests on 28 U.S.C. § 1291.

Statement

Appellant, Elgie & Company (Elgie) sued Appellee appellant-cross-appellant South African Marine Corporation, Ltd. (South African Marine) to recover $11,500 for the loss of one crate said by the shipper to contain a generator. The one crate did not outturn at destination. South African Marine defended on the basis of limitation of liability found in the contract of carriage, amounting to $500 per package, and also sought indemnity from International Terminal Operating Co., Inc. (ITO) on the grounds that ITO was responsible for the loss due to its negligence and/or breach of its implied warranty of workmanlike service.

ITO defended on the grounds that they were not negligent, and claimed that the case had been loaded, albeit on another vessel.

The trial was held from March 19, 1976 to March 23, 1976, before Magistrate Gerald L. Goettel, prior to his elevation to District Court, pursuant to a stipulation among the parties.

Judge Goettel found South African Marine liable to Elgie, and allowed recovery of $500 per package, in accordance with the limitation contained in the bill of lading and in the U.S. Carriage of Goods by Sea Act (COGSA). Indemnity was denied South African Marine from ITO. Judgment was awarded Elgie in the amount of $500.

Statement of Facts

South African Marine was the owner of the S.A. NEDERBURG, and operated it in the ocean carriage of goods by water for hire between the ports of New York and Durban, South Africa, in the Spring of 1974. Shuron/Continental, a division of Texton Corporation sold a number of parts relating to optical machinery to Elgie in 1973 (131a). The order was shipped from Tampa, Florida, on or about November 30, 1973 (159a) to Copeland Shipping, freight forwarder on Long Island. On or about March 13, 1974, Copeland delivered 12 packages said to contain optical machinery and accessories to International Terminal Operating Co., terminal in Brooklyn (203a). ITO received the 12 packages on behalf of the ocean carrier and issued a Dock Receipt (Ex. E—596a). The Dock Receipt described the shipment as follows:

> "11 Tw. CTNS./OPTICAL MACHINERY & 1 CRATE/ACCESSORIES."

On the face of the dock receipt it is noted that the goods were received by an ITO receiving clerk. The 12 packages were bound for Durban, South Africa (Ex. E—596a).

After the receipt of the 12 packages by ITO, a stowage checker had the shipment placed in the pier warehouse to await loading on board a South African Marine vessel. On March 15, 1974, South African Marine issued a "received for shipment" bill of lading setting forth the particulars of the shipment. There was no room on the S.A. MORGENSTER and the shipment was slated to be loaded on the next vessel, the S.A. NEDERBURG. No evidence was produced by ITO that any part of the shipment had

been loaded on the MORGENSTER other than the unsigned tally which South African Marine never sees. (251a-285a, 292a-232a)

On March 21, 1974, the S.A. NEDERBURG arrived in New York and berthed at the 59th Street Pier, Brooklyn. From March 21 through March 24, 1974, ITO, the vessel's terminal operator and stevedore, loaded cargo in all hatches of the S.A. NEDERBURG for South and East African ports, including Durban, South Africa. A total of 608 long tons of cargo was loaded on board the S.A. NEDERBURG for Durban, including according to ITO, the shipment of optical machinery and accessories.

On March 22, 1974, the shipper returned the bill of lading and asked South African Marine to place an "onboard" stamp on the bill of lading. This the carrier did, but it did not issue the bill of lading pending confirmation from ITO that the cargo was loaded and the vessel had sailed. (262a-272a, 282a)

On March 24, 1974, the S.A. NEDERBURG finished loading and sailed for South and East African ports. Subsequently, the stamped bill of lading No. 66, was released, but only after ITO had failed to notify South African Marine that any part of the shipment in suit had been shut-out from the S.A. NEDERBURG. (256a-261a)

On April 29, 1974, the S.A. NEDERBURG arrived at Durban, and commenced discharging the cargo destined for that port. On May 9, 1974, the discharging operations were completed and the S.A. NEDERBURG sailed for her next port. After discharge of the Durban-bound cargo, only 11 packages of optical machinery and accessories could be located on the pier for delivery to the consignee. The missing pack-

age was never found and the shipment was delivered to the consignee 1 package short.

District Court Opinion

The District Court found that ITO had custody of the goods until they were to be loaded aboard South African Marine's vessel (5a).

The goods were originally destined for carriage on board the S.A. MORGENSTER, another vessel owned by South African Marine. However, the MORGENSTER was overbooked. Some cargo was intentionally shut out, but the District Court found that it did not include any of Elgie's cargo (7a). The Court did find that the large crate and smaller eleven cartons were moved out by ITO to be loaded aboard the MORGENSTER (7a). Although the District Court further found that the one large crate was "probably" loaded on the MORGENSTER, the only evidence to support this assumption was an *unsigned* tally sheet conveniently produced by ITO. (29a) *All* other tally sheets for cargo loaded on the vessel produced by ITO were duly *signed*. (622a) The crate did not outturn from the MORGENSTER at Durban or any other African port.

The Court found a dispute in the testimony, as to whether ITO had notified South African Marine of a "split shipment" (7a, 8a), i.e. that only part of the shipment had been loaded on the MORGENSTER.

ITO's location man, Ries testified that he might have made a telephone call, notifying South African Marine of the partial shut-out. (342a-345a, 383a) No testimony or direct evidence appears in the record as to notification in

this instance. However, this is in direct conflict with the dock receipt not evidencing a split shipment (Ex. B—591a, 286a) and the testimony of what actually transpired during the time in question as testified to by Documentation Manager Minutello. (250a-251a) This testimony was not controverted in any way at the trial, but nevertheless, the Court found a "dispute" existed.

A day or two after the MORGENSTER sailed, the stevedores discovered Elgie's cargo still sitting on the pier. The District Court found that the bill of lading and other documents were then changed to indicate that *all* of Elgie's cargo would go forward on South African Marine's next vessel, the S.A. NEDERBURG. (7a)

South Arican Marine issued a short form bill of lading for all eleven cartons and the crate, a total of 12 packages, which was later claused "Received on Board".

The bill of lading and the dock receipt incorporated all the terms and conditions of the carrier's regular long-form bill of lading (595a). The long form contained the usual clause extending by contract the application of COGSA, to the entire time that the goods were within the custody of the carrier, including the pre-loading period. The District Court found that such incorporation was proper. (19a)

On April 29, 1974, the NEDERBURG arrived in Durban, South Africa, and discharged its cargo. When the consignee picked up the Elgie shipment, only the eleven cartons were delivered. The missing crate was never located.

The District Court determined that Elgie was entitled to recovery against South African Marine as carrier for the loss, and that pursuant to the contract of carriage, the

recovery was limited to $500. (28a) Although South African Marine, a foreign carrier, had relied entirely on ITO as its terminal operator and stevedore in handling and recording the receipt and loading of the shipment, (97a-101a) the Court let ITO off, and denied indemnity to the carrier. This despite the fact that *had* ITO notified the carrier that the crate had been loaded on the MORGENSTER, or that it *had* been shut-out from the NEDERBURG, the bill of lading would have been modified accordingly. (263a) The only evidence that the crate was loaded on the MORGENSTER was an unsigned tally, the *only* unsigned tally for that ship. There is no indication on the dock receipt that one crate went on the MORGENSTER. (Exs. B, E, 591a, 596a) The packet of shut-out dock receipts sent to the carrier by ITO after the MORGENSTER sailed included the dock receipt for the shipment in question. (Ex. G, 601a) (251a-260a) Relying on this, the carrier changed the name of the vessel on the bill of lading to the NEDERBURG.

There was absolutely no evidence that the carrier made any misrepresentation or committed any fraud. The bill of lading was issued routinely, based upon information flowing from ITO's Brooklyn Terminal to the carrier's office in Manhattan. (261a-263a)

South African Marine believes the judgment below limiting Elgie's recovery to $500 is correct in all respects, but seeks modification of the judgment against ITO denying South African Marine's claim for indemnity. South African Marine requests this Court to modify the award so as to grant indemnity, including reasonable counsel fees, to South African Marine for the reasons set forth *infra*. In addition, South African Marine filed a protective appeal in the event this Court should modify the award as to that

part of the judgment granting relief to Elgie, in which case South African Marine seeks any additional award against ITO.

Questions Presented

1. Did the District Court err in limiting the recovery against South African Marine to the $500 package limitation contained in the contract and in the Carriage of Goods by Sea Act, which was incorporated in the bill of lading?

2. Did the District Court err in failing to grant South African Marine indemnity against ITO in light of the fact that the District Court found that the stevedores were in complete control and custody of the cargo after receipt and at fault for failing to load all of the cargo aboard the S.A. NEDERBURG or to notify South African Marine otherwise?

POINT I

South African Marine Corporation has not precluded itself from reliance upon the terms and conditions of the contract of carriage by issuing an on board bill of lading.

In this case, it is beyond dispute that the shipper accepted the terms and conditions of the carrier's bill of lading including its limitation of liability provisions.

> "[I]t is settled law that parties may expand the coverage of the Carriage of Goods by Sea Act by the terms of a bill of lading."

Toyomenka, Inc. v. *S.S. Tosahura Maru,* 1974 A.M.C. 1531 *rev'd on other grounds,* 523 F. 2d 518; 1975 A.M.C. 1820 (2nd Cir., 1975).

The U.S. Carriage of Goods by Sea Act of 1973, hereinafter referred to as COGSA, was incorporated in the carrier's bills of lading and was expressly made to govern "throughout the entire time the goods are in the custody of the carrier." See, Clause I of defendant's Ex. "D". (595a) Consequently, the $500 package limitation applied in this case from the moment the carrier received the goods, not just when they were loaded aboard a vessel as COGSA provides by force of law.

Moreover, the District Court correctly held that even if the bill of lading was void and ineffective with respect to the crate, the dock receipt would produce the same result of limiting the plaintiff's recovery to $500 (20a). As the Court stated in *Eastman Kodak* v. *Transmariner et al.,* 1974 A.M.C. 123 (SDNY 1974) (not officially reported):

> The dock receipt issued on behalf of defendants for the container specifically incorporates "all the terms of the regular form of . . . bill of lading of the carrier." The bill of lading form in turn states that the provisions of the COGSA shall govern "before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier." Although no bill of lading was ever issued or signed, several courts have held that where "[t]he dock receipt clearly incorporates the terms of the bill of lading[,] [t]hese terms bec[o]me a part of the understanding of the parties upon issuance of the dock receipt." *Berkshire Knitting Mills* v. *Moore-McCormack Lines, Inc.*, 1966 AMC 2651, 2653, 265 F. Supp. 846, 848 (S.D.N.Y. 1965); *John Deere & Co.* v. *Mississippi Shipping Co.*, 1959 AMC 480, 170 F. Supp. 479 (E.D. La. 1959).
>
> 1975 AMC at 125-126

The case which Elgie cites in its brief on appeal, *Toho Bussan Kaisha, Ltd.* v. *American President Lines,* 155 F. Supp. 886, 889 *affirmed* 265 F. 2d 418 which purportedly supports the claim that its action is based on misrepresentation, is not applicable to the case at bar. The Court in the *Toho* case, supra, stated that:

> Plaintiff does not claim for breach of contract of carriage. It does not even allege that it was the beneficiary of such a contract. . . . Plaintiff is not basing its claim upon the bill of lading as a contract. It is not suing as an assignee of the party who agreed to this restriction of the legal time within which to bring an action.
>
> 155 F. Supp. at 889

In other words, the plaintiff in the *Toho* case was not a party to the contract of carriage and consequently could not be bound by its terms. Elgie, however, is bound by the contract of carriage which limited liability to the entire time South African Marine had custody of the goods. The essence of Elgie's claim is for breach of the contract of carriage. After all the smoke is cleared away, the only evidence produced at trial by appellant is the sort of evidence that is usually offered as a *prima facie* case in most cargo loss cases. No evidence of fraud, misrepresentation, willful negligence or reliance was even offered by Elgie.

In fact, the Court in *Toho, supra,* distinguished its case from those such as the one now before this Court:

> Cases in which recovery is sought for the *non-delivery of goods* or for delivery in a faulty condition and in which the recitals in the false bills of lading are significant only as admissions which the carrier is estopped to deny, rather than as the basis of an action for fraud, *must be distinguished.* (Emphasis supplied)
>
> 155 F. Supp. at 889

The Court cited *Olivier Straw Goods Corporation* v. *Osaka Shosen Kaisha,* 27 F. 2d 129 (2nd Cir., 1928) *cert. denied* 278 U.S. 618 (1928), as an example of an estoppel situation. Elgie has apparently either lost sight of, or chooses to ignore, the Court's directive in *Toho* that non-delivery or estoppel cases must be distinguished from those which are based on fraud when it cites *Olivier Straw Goods, supra* and *Miles Metal Corp.* v. *M.S. Havjo,* 494 F. 2d 563 (2nd Cir., 1974).

Even if Elgie claims to have established the "falsity" of the bill of lading, there is no support for Elgie's position

that the "falsity" *ipso facto* extinguishes all the defenses and limitations in the bill of lading. The cases cited by Elgie in support of this contention simply are not on point.

In *Olivier Straw Goods Corporation* v. *Osaka Shosen Kaisha,* (ALASKA MARU), 27 F. 2d 129 (2nd Cir. 1923), the seller obtained an "onboard" bill of lading prior to the ship's arrival. A dock receipt was issued to the shipper acknowledging receipt of the goods by the carrier. While the goods were in the carrier's warehouse they were destroyed in an earthquake.

A careful reading of the *Alaska Maru* holding will show that case cannot be controlling here. There was no question in the *Alaska Maru* that the goods were known to be on the pier in the carrier's warehouse at the time of the loss. In fact, the carrier claimed that the earthquake which damaged the goods on the pier was an "Act of God" for which the carrier was not liable. However, the Court stated that the carrier was estopped to deny the "onboard" provision in the bill of lading. *Olivier Straw Goods Corp.* v. *Osaka Shosen Kaisha, supra,* at page 133. Consequently, how could an earthquake damage goods which were, by law, deemed to be aboard a vessel miles from the earthquake? It is obvious what the carrier in the *Alaska Maru* attempted to do. Had it been permitted to do so, the carrier, by asserting a position contrary to what was evidenced in the bill of lading, would have effectively altered its liability to the consignee as well. In the instant situation however, estoppel would not have this effect. Once the carrier received the goods, its liability for damage or loss was limited to $500 per package whether the loss or damage occurred in a warehouse on the pier or on board a vessel. There is simply nothing to be gained by the carrier

asserting a position contrary to one evidenced in the bill of lading, and the carrier has in fact, not questioned the statements in that document.

The other case cited by the Elgie in support of its contention is *Miles Metal* v. *M.S. Havjo, supra* which simply established that an onboard bill of lading is not *prima facie* evidence that cargo has, in fact, been loaded on an ocean carrier.

In the *Havjo* case, the carrier maintained that the cargo had, in fact, been loaded on board its vessel and that consequently its liability was limited to $500 as provided by the Carriage of Goods by Sea Act, 46 U.S.C. §1304(5). The Second Circuit Court of Appeals noted, however, that the defendant carrier had produced at trial no evidence whatsoever to show that the cargo was ever placed on board the vessel. The carrier, instead, attempted to rely solely on the "onboard" bill of lading as *prima facie* evidence that the cargo had been loaded on board the vessel. The Court's decision to exclude the bill of lading was on an evidentiary basis, not premis[illegible]n the law of estoppel. The Court merely held that t[illegible]efendant had failed in its burden of proving the cargo [illegible]s loaded on the vessel; a necessity to the package limitation as the contract of carriage *did not* extend the coverage from time of receipt to time of delivery.

The District Court in the case at bar explained as follows:

> The final argument of the plaintiff is that the limitation cannot be applied here because there was fraud or negligence on the part of the shipper which invalidates the bill of lading and negates the effectiveness of

> the package limitation. Plaintiff relies primarily on the *Havjo* case, but it stands simply for the proposition that a shipper cannot gain the benefit of the package limitation merely by issuing a bill of lading claiming that the goods were on board when, in fact, they were not. While there was undoubtedly negligence on the part of either the shipper or the stevedore (a point to be considered subsequently), there clearly was no fraud. The bill of lading was simply an error and nothing more. (21a)

The holding in the *Havjo* was recently discussed in *Eastman Kodak* v. *Transmariner, supra.* In that case, a shipper's packed and sealed container was stolen from the pier before the issuance of an ocean bill of lading. The District Court held the container to be a single package, subject to the $500 package limitation, based on the incorporation of the terms of the long form bill of lading in the dock receipt. However, the interesting point in the *Transmariner* case is that the plaintiff attempted to rely on its own interpretation of the holding in the *Havjo* to negate the application of the package limitation. The Court responded to plaintiff's argument as follows:

> There (Havjo) the court was concerned with and ruled upon an unrelated issue—the evidentiary weight to be given an on-board bill of lading offered as the sole proof that the cargo had in fact been placed onboard the vessel. Necessarily, therefore, the panel had no occasion to discuss or rule upon the question of the extension of application of COGSA provisions in the absence of an ocean bill of lading.

> In the case at bar, the dock receipt validity extended the application of COGSA in its limitation to the entire period that the goods were in the custody of the defendants.
>
> 1975 A.M.C. at 126.

In the instant case, it cannot be said that the $500 package limitation is a result of the shipowner's "fraud" or misrepresentation. It is rather the result of a prior agreement between the parties, that should a loss occur while in the custody of the carrier, recovery for that loss will be limited to the $500 per package. This stipulation could easily have been avoided by the shipper declaring the full valuation and paying an extra charge.

It would be paradoxical to estop the shipowner from denying the statements in the bill of lading, as well as the validity of the bill of lading, and yet preclude the ocean carrier from utilizing a valid and long established contractual provision contained therein, i.e. the $500 limitation. This limitation is the same as that which Congress has refused to change in COGSA since 1936. Extension of the Act by contract to shipments awaiting loading in foreign commerce is appropriate, as COGSA could even be extended to domestic shipments. U.S. Carriage of Goods by Sea Act, 1936, Section 13, U.S. Code, Title 46, Section 1312, 49 Stat. 1212. In fact, on the pier, the carrier could have contracted for even a smaller limit, as there is no statute to the contrary governing bailments.

As stated in *B.F. McKernin & Co., Inc.* v. *U.S. Lines*, 416 F. Supp. 1068 (S.D.N.Y. 1976):

> [W]hen a federal statute governs the rights of parties, the standards of the Act cannot be ignored by:

> 'casting [a] claim for relief in terms of common law negligence [or tort] . . . . A holding to the contrary would permit any party to circumvent the restrictions of the [federal] Act through the insertion of a talismatic characterization of its claim as one for 'negligence.' It is quite plain, however, that the declaration in 49 U.S. Code, sec. 81 (and in sec. 1300 of COGSA)—bills of lading . . . 'shall be governed by this Chapter—must be taken to preclude alternative and supplementary liability under state law . . . . The substance of the rule cannot be avoided by the form of the complaint. *G.A.C. Commercial Corporation* v. *Wilson,* 271 F. Supp. 242, 247 (S.D. N.Y. 1967).'
>
> 416 F. Supp. at 1071.

The Court in *McKernin* held that the bill of lading clause, making COGSA applicable throughout the entire time the goods are in the carrier's custody, *precluded* the consignee's common law claims.

Elgie should not be able to circumvent the contractual limitations by the mere form of its action. The essence of Elgie's claim relates to a breach of the contract of carriage. Although there was *some* evidence (unsigned tally) that the missing crate went forward on another vessel, (622a) it was never found on that vessel. This is an ordinary shortage case. As the Court in *Mongolia-Manchuria,* 1933 A.M.C. 719 (2d Cir., 1933) stated:

> [B]ut a carrier, in case of complete and *unexplained failure to deliver, is entitled to the benefits of the bill of lading clauses,* and *no breach of contract could be more material or essential than a failure to deliver the goods at all.* In Adams Express vs. Croninger,

> 226 U.S. 491, there was an unexplained failure to deliver a diamond ring entrusted to an express company for carriage and the question presented was whether the $100 limitation was applicable. The Court held it was. *See, Hart* vs. *Pa. R.R.,* 112 U.S. 331, 340. We have held that in cases of nondelivery, limitation clauses applied. *Hugetz* vs. *Compania Trasatlantica,* 270 Fed. 90; *Hohl* vs. *Norddeutscher Lloyd,* 175 Fed. 544. (Emphasis supplied).
>
> 1933 A.M.C. at page 723.

Whether the missing crate went forward on the NEDERBURG or the MORGENSTER, the letter of credit would have been negotiated as long as a bill of lading or bills of lading reflected that they were aboard some vessel; *any* vessel of the carrier. Consequently, if Elgie's claim is that the bill of lading is erroneous because the goods did not go aboard the NEDERBURG but aboard the MORGENSTER, its damages as a result of this error would be the same—$500. Furthermore, the bill of lading permits substitution of vessels. Also, the letter of credit involved agreements between the shipper, the consignee and their banks, and did not reach or bind the carrier. If Elgie claims that the bill was fraudulent because the crate was not loaded aboard *any* vessel, it did not meet its burden of proof. The Judge found on the evidence that the crate more probably than not, was loaded on the MORGENSTER. Each and every element of fraud must be established by clear and convincing evidence. *U.S. Fibres Inc.* v. *Proctor & Schartz, Inc.,* 358 F. Supp. 449, 460 aff'd 509 F. 2d 1043 (6th Cir., 1975). What actually happened to the crate was never resolved. This is usually the case when shortages occur. *See, Mongolia-Manchuria, supra.*

POINT II

ITO must indemnify the ocean carrier for all damages it has suffered or may suffer as a result of the loss of the crate.

ITO furnished to South African Marine Lines complete terminal and stevedoring services at the Brooklyn Army Terminal which included receiving, checking, watching and loading all cargo destined for South African Marine vessels, including the S.A. NEDERBURG during the voyage in suit. (Ex. ITO G, 620a) The foreign carrier did not have its own pier and simply sailed vessels in and out of New York, relying on ITO for all its terminal services. (203a-205a) The District Court found that ITO was primarily at fault for failure to load all the cargo (12 packages) aboard the MORGENSTER. (23a) It further found that both the ocean carrier and the stevedore (ITO) were negligent and responsible for the issuance of the erroneous bill of lading (26a). In denying South African Marine indemnity from ITO, however, the District Court premised its decision on two erroneous conclusions. One is that the ocean carrier had not met its burden of proving that the stevedore's negligence was the proximate cause of the loss. (27a) The other was that since the defendant (South African Marine) and third-party defendants (ITO) were *concurrently* negligent, the claim for indemnity is barred.

It is well settled law that when a stevedore-terminal operator fails to fulfill its obligations and is negligent, it must respond to the shipper for any damage to cargo caused by such negligence. *Luigi Sierra Inc.* v. *S.S. Francesco,* 1965 A.M.C. 2029 (S.D.N.Y.) aff'd 379 F. 2d 540 (2nd Cir., 1967).

A stevedore or terminal operator is not an agent of the ocean carrier but an independent contractor. Carriers have been held liable for the acts of stevedores and terminal operators, not because they are the agents of the carrier but because the carriers have a non-delegable duty to cargo. The inequities faced by the shipowner in defending claims for which it was not at fault but ultimately accountable by virtue of a strict liability for unseaworthiness, led to the Supreme Court decision in *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1955). It was established in *Ryan* that the shipowner had a right to indemnity from the stevedore-terminal operator under an *implied warranty of workmanlike service.* The *Ryan* situation applies with equal force where the indemnitee's liability is predicated on some non-fault basis other than unseaworthiness. *Fairmont Shipping* v. *Chevron International Oil Co.*, 511 F. 2d 1252 (2nd Cir., 1975) Footnote 11 at p. 1258, *cert. denied*, 423 U.S. 838 (1975); *Cameco, Inc.* v. *S.S. "American Legion"*, 514 F. 2d 1291 (2nd Cir., 1974) (carrier's liability to consignee under contract of carriage). It is now beyond dispute in this Circuit that implied in *every* maritime service contract is a *warranty* that service will be performed in a diligent and workmanlike manner. *Fairmont Shipping Corp.* v. *Chevron International Oil Co., supra.* This *warranty* as a general rule encompasses an obligation to indemnify a shipowner where a shipowner is exposed to liability to cargo interests as the result of an *incomplete* or *unsatisfactory* performance of a stevedore or terminal operator. See, *David Crystal, Inc.* v. *Cunard Steamship Co.*, 339 F. 2d 295 (2nd Cir., 1964), *cert. denied*, 380 U.S. 976 (1965); *United States* v. *Bull Steamship Line*, 274 F. 2d 877 (2nd Cir., 1960).

The breach of the implied warranty of workmanlike performance may occur without negligence on the part of the stevedore-terminal operator on the theory that "liability should fall upon the party best situated to adopt preventive measures." *Italia Societa Per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964). *See also, David Crystal, Inc.* v. *Cunard Steamship Co., supra.*

The State Court case cited by the District Court in holding that the ocean carrier had not met its burden of proving that the stevedore's negligence was the proximate cause of the loss, *Saugerties Bank* v. *Delaware & Hudson Co.*, 236 N.Y. 425 (1923), is clearly inapplicable to the case at bar. There the Court, in deciding that the carrier was not liable, under the facts of that case, for the consequences of a forged bill of lading, merely restated the general proposition that one is not chargeable with damages caused by the unforeseeable intervening criminal act of a third-party. *Saugerties Bank* v. *Delaware & Hudson Co. supra,* at 431. One of the many definitions of "proximate cause" set forth in *Saugerties, supra,* was that in order to find that negligence was the proximate cause of a loss, it must appear that the loss was the natural and probable consequence of the negligence and that it ought to have been foreseen in the light of the attending circumstances. (*Saugerties, supra* at 431.) Certainly, if ITO was "primarily at fault" (23a) for failing to load all the cargo on the MORGENSTER and was concurrently negligent with the carrier for the issuance of an erroneous bill of lading which indicated that all the packages had gone forward on the S.A. NEDERBURG, it was a foreseeable, natural and probable consequence that the one crate which *may* have been loaded aboard the MORGENSTER would get *lost,* there being no document or other notification alerting South African Marine to its presence on that vessel. This being true, no entry could possibly be found on

the manifest of cargo on board the S.A. MORGENSTER. Unmanifested cargo invites disappearance somewhere along the way. Moreover, the District Court admitted that the evidence that the missing crate was loaded aboard the MORGENSTER "was far from conclusive." (20a). The hatch tally introduced into evidence (ITO's Ex. "H" 622a) is not only unsigned (348a), but as the Court pointed out, the tally itself contained unexplained discrepancies (363a, 338a, 336a).

It must be remembered that ITO was responsible for the receiving, sorting, organizing and loading of South African Marine vessels calling at New York. ITO witness, Pier Superintendent Beauchamp, admitted that he received no instructions on how to load a vessel from the South African Marine representative. (327a) The carrier relied on I.T.O. as an expert. *Master Shipping Agency* v. *M.S. Farida*, 1976 AMC 91 (S.D.N.Y. 1975). Although ITO asserts that they never quaranteed that cargo was loaded on a certain vessel, ITO witness Beauchamp admitted that it was important to advise the carrier of a "split shipment" (354a) and though he acknowledged that an after-sailing pier inventory would be a better practice to determine what cargo had been shut out of the MORGENSTER, Beauchamp could not recall ITO conducting such an inventory, a duty clearly within ITO's jurisdiction and control. Further, no inventory was produced at trial. (376a) John Flynn, ITO's receiving clerk, had a plausible explanation as to what happened to the missing package when he stated:

> "A. Yes. But when they are working two ships within a week of each other loaded with cargo, anything can happen. Everybody has overlooked that, the volume of work.
>
> * * * * *

A. This is the truck, four pallets, the same machine driver doesn't take the cargo away.

"Your three pallets of 11 pieces could very well have been stacked and taken in one move and put here and another machine come along and took the case and put it there, and with the volume of business, this got boxed in by more cargo, this made the ship, your one piece, excuse me, this got blocked in and when you got it—" (386a).

It was obviously the duty of the ITO location man to check for cargo left behind or misplaced by ITO personnel. I.T.O. was the custodian. (388a) Yet, as Flynn explained in response to the following questions:

Q. "He wouldn't know about that? But the superintendent testified that you got different locations on the pier for different ships and you keep cargo separated by ships.

A. "We do.

Q. "So, when the MORGENSTER was finished loading, there should be nothing left in the MORGENSTER area.

A. "Correct, not if it's mixed up with the NEDERBURG freight, no. So here we are all clear here, the MORGENSTER is gone. Now we go and load the NEDERBURG and lo and behold we find the 11 that should have gone on the MORGENSTER.

Q. "The MORGENSTER cargo which is mixed up—

A. "This happens regularly. This isn't a rare instance. I mean, I am not going to—

Q. "All right.

A. "I mean, it is very possible for it. I mean, you got to go by the machine drivers are the final thing.

ey can't come and testify. They are told to put this here. So if they stop and get coffee and drop it off here and the next guy goes to door 50, it goes with him.

"Let's face it. I mean, you can't control it. There is supervision, they are told to put it in such and such a door, but it is very easy for something to go astray."

(389a-390a)

Such confusion may have been "easy" for I.T.O., but why should the carrier be left holding the bag?

Flynn asserted that the 12 packages in question were not shut out of the MORGENSTER and that as far as anyone knew, they had *all gone forward* on the MORGENSTER (393a). Yet, if this were so, why did South African Marine receive notice of a complete shut-out as evidenced by Exhibit "G" page 7. (601a) Exhibit "G" is the list of *complete* shipments that were shut out of S.A. MORGENSTER that were to go forward on S.A. NEDERBURG. Indeed, Mr. William King, receiving clerk for ITO, while examining ITO's copy of the dock receipt admitted that there was *nothing* on that document to show that any cargo was loaded on the MORGENSTER (413a). In fact, he admitted that someone on the pier had made a mistake (413a, 414a). ITO's failure to notify South African Marine of the disposition of cargo shipped on the MORGENSTER, where it was under a continuing duty to do so, constituted at the very least negligence, and it was certainly a breach of an implied *warranty* of workmanlike service.

The District Court was clearly in error in denying South African Marine indemnity from ITO because of "concur-

rent negligence." (27a). It cited *McFall* v. *Compagnie Maritime Belge,* 304 N.Y. 314, 1952 A.M.C. 1860 (1952) and *Amerocean Steamship Co.* v. *Copp.,* 245 F. 2d 291 (9th Cir., 1957) to support its position. The Court in the *McFall* case stated that:

> "Where several tortfeasors are involved an implied contract of indemnity arises in favor of the wrongdoer who has been guilty of passive negligence, if there be such, against the one who has been actively negligent."
>
> 1952 AMC at 1869

The *Amerocean* Court also spoke of "active concurrent negligence." *Amerocean supra* at 294. However, the Supreme Court in *Weyerhaeuser S.S. Co.* v. *Nacirema Co.,* 355 U.S. 563, pointed out that "in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is *inappropriate.*" 353 U.S. at 569.

Once the District Court found that ITO had been negligent in failing to load all the cargo aboard the MORGENSTER, or that it was contributorily negligent in the issuance of the erroneous bill of lading, ITO breached its *warranty* of workmanlike service, *as a matter of law. Rodriguez* v. *Olaf Pedersen's Rederi A/S,* 527 F. 2d 1282 (2nd Cir., 1975).

The mere negligence or some fault by the shipowner is not enough to absolve the stevedore from this warranty. *Rodriguez* v. *Olaf Pedersen's Rederi A/S, supra; Master Shipping Agency Inc.* v. *M.S. Farida,* 1976 AMC 91 (SDNY 1975). The shipowner's conduct must have prevented or seriously handicapped or interfered with the stevedore-terminal operator in his efforts to perform his duties. *Henry* v. *A/S Ocean,* 512 F. 2d 401, 407 (2nd Cir., 1975). "There must be 'active hindrance.'" *Fairmont Shipping*

Corp., supra at 1260; *Albanese* v. *N.V. Nederl. Amerik Stoomv Maats,* 346 F. 2d 481, 484 (2nd Cir., 1965), *rev'd on other grounds,* 332 U.S. 283 (1965).

> "Whatever may have been the respective obligations of the stevedoring contractor and of the shipowner to the injured longshoreman for proper stowage of the cargo, it is clear that, as between themselves, *the contractor, as the warrantor of its own services cannot use the shipowner's failure to discover and correct the contractor's own breach of warranty as a defense.* Respondent's failure to discover and correct petitioner's own breach of contract cannot here excuse that breach." (Emphasis added)

Ryan Stevedoring Co. v. *Pan-Atlantic S.S. Corp., supra,* at pages 134-135.

POINT III

South African Marine Corporation, Ltd., is entitled to an award for counsel fees incurred in defending the claim of appellant.

The District Court denied South African Marine attorney's fees (27a). However, full indemnity entitles the ocean carrier to collect reasonable attorney's fees and expenses from ITO. *Iligan Integrated Mills, Inc.* v. *S.S. John Weyerhaeuser,* 507 F. 2d 68 (2nd Cir., 1974); *Nichimen Company, Inc.* v. *M.V. Farland,* 462 F. 2d 319 (2nd Cir., 1972); *A.C. Israel Commodity Co.* v. *American-West African Line, Inc.,* 397 F. 2d 170 (3rd Cir.) *cert. denied,* 393 U.S. 798 (1968); *David Crystal* v. *Cunard S.S.*

Co., supra; Eutectic Corp. v. *M/V Gudmundra,* 1974 A.M.C. 255 (S.D.N.Y.).

South African Marine under the facts in this case is entitled to such an award.

CONCLUSION

The District Court properly limited plaintiff's recovery to $500.00. However, the District Court erred, in precluding shipowner from recovering indemnity from its terminal operator in that the shipowner did not prevent or hinder ITO from rendering the workmanlike service to which the carrier was entitled and for which it paid.

Since ITO rendered substandard stevedoring services to South African Marine, which led to foreseeable liability on behalf of the ocean carrier, South African Marine is entitled to full indemnity from ITO including reasonable counsel fees for breach of warranty of workmanlike service.

Respectfully submitted,

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Service of three (3) copies of the within BRIEF is admitted this 14th day of Feb. 1977

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